No. 40057-0-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

MICHAEL ANDREW HECHT,

Appellant.

On Appeal from the Pierce County Superior Court
Cause No. 09-1-01051-1
The Honorable James Cayce, Judge

OPENING BRIEF OF APPELLANT

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I. SUMMARY OF THE CASE

In the summer of 2008, Tacoma attorney Michael Andrew Hecht campaigned for a Pierce County Superior Court judgeship against incumbent Sergio Armijo. Shortly before the election, a downtown Tacoma business owner told Judge Armijo's son, Morgan Armijo, that he believed Hecht had been soliciting prostitutes in the neighborhood. Morgan Armijo conducted his own investigation, and turned his conclusions over to the Tacoma Police Department. Tacoma police detectives then initiated an independent investigation. And the Tacoma News Tribune soon began publishing articles about the investigation, detailing the rumors about Hecht's behavior.

Hecht was elected judge in August of 2008. But detectives and news reporters continued to investigate, and interviewed several male prostitutes who alleged that Hecht paid them to perform sex acts with him at his law office. One male also alleged that Hecht threatened to kill him if he discussed their relationship. As a result, the State filed charges against Hecht for soliciting a prostitute and felony harassment, and a jury subsequently found Hecht guilty of both charges.

II. ASSIGNMENTS OF ERROR

1. The prosecutor's misconduct during closing argument deprived Michael Hecht of his constitutional right to a fair trial.

2. The charging document and the "to convict" instruction for the crime of harassment were constitutionally deficient because they both failed to include the essential element that the threat was a "true threat."

3. The State failed to prove beyond a reasonable doubt every essential element of the crime of harassment.

4. The trial court erred when it admitted testimony describing an uncharged prior offense under ER 404(b).

5. The trial court erred when it ruled that testimony describing uncharged prior offenses was more probative than prejudicial.

III. ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR

1. Did the prosecutor commit flagrant and ill intentioned misconduct during closing arguments, and thereby deprive Michael Hecht of his right to a fair trial, when he: presented PowerPoint slides to the jury containing photographs of Hecht and prosecution witnesses with captions summarizing

their testimony or with captions that expressed the prosecutor's opinion about their credibility and about Hecht's guilt; presented slides to the jury containing photographs of Hecht with a large red "GUILTY" printed across his face; and when he told the jury that it must reach a verdict that represented the "truth?" (Assignment of Error 1)

2. Is the fact that a threat must be a "true threat" an essential element of the crime of harassment? (Assignment of Error 2)

3. Where due process requires the essential elements of a criminal charge to be pled in the charging document and included in the "to convict" instruction, is the fact that a threat must be a "true threat" an essential element of the crime of harassment which must be pled in the charging document and included in the "to convict" instruction? (Assignment of Error 2)

4. Did the State fail to prove the elements of harassment where there was insufficient evidence that Joseph Hesketh had any reasonable fear that Michael Hecht would actually carry out his threat? (Assignments of Error 3)

5. Did the State fail to prove the elements of harassment where

there was insufficient evidence that Michael Hecht could have foreseen that Joseph Hesketh might view his statements as a serious threat? (Assignment of Error 3)

6. Was testimony describing an uncharged prior offense more prejudicial than probative? (Assignments of Error 4 & 5)

IV. STATEMENT OF THE CASE

A. SUBSTANTIVE FACTS

The area on Broadway between South 9th Street and South 7th Street in downtown Tacoma is known as "Antique Row" because of the many antique stores that occupy that block. (RP TRP3 378-79)[1] In the mid-2000's, there was a theater called Mecca, which specialized in adult films, and a bar called Club Silverstone, which catered to gay men, in the streets adjacent to Antique Row. (TRP 394-95, 397, 415, 584; TRP5 879)

The area was also known for having a high transient population, and significant drug activity and male prostitution. (TRP5 846, 879, 880-81; TRP6 985-86) It was common for prostitutes to loiter on the street near Mecca and Club Silverstone, and for "johns" to circle the block, pick them up, and drive to a

[1] The transcripts containing the pretrial and post-trial hearings will be referred to by the date of the proceeding. The transcripts containing the trial, labeled Volumes 1 thru 8, will be referred to as "TRP" followed by the volume number.

private location to engage in sex acts in exchange for money. (TRP3 382, 396, 398-99, 415, 443, 521, 523; TRP4 747-48; TRP 5 846-47, 859-60, 872, 879-81)

Tacoma attorney Michael Hecht was well known by residents, shopkeepers and employees in the Antique Row area because he often visited antique stores, and occasionally went to Mecca, Club Silverstone, and other neighborhood businesses. (TRP4 397-98, 413, 585-86; TRP5 790-91; TRP6 1096, 1135) Hecht also provided legal representation to several business owners in the neighborhood. (TRP3 414; TRP5 801, 819, 1217-18; TRP6 1094, 1135-36; TRP7 1217, 1218, 1223-24)

Hecht attended several neighborhood business association and crime prevention meetings, and advocated for the homeless and transient population. (TRP3 432-33, 446; TRP5 796, 800, 863-64) Hecht was often seen circling the Antique Row area streets in his car, and was occasionally seen driving away from the area accompanied by a transient man. (RP3 380, 384, 385, 399-401, 416-17, 443; TRP4 748, 751; TRP5 794, 828 849-51, 861, 862)

Before attending law school, Hecht worked in the antique restoration business. (RP TRP3 414; TRP7 1209-10) He continued his involvement with the antiques business after law

school and while running his general law practice. (TRP3 414; TRP7 1210-12) Hecht shared an office suite with several other lawyers in a building located at 3643 North Pearl Street in Tacoma's North End neighborhood.[2] (TRP3 427; TRP4 565-66, 573, 576; TRP7 1216)

In 2008, Hecht ran for a position as a Pierce County Superior Court Judge against incumbent Judge Sergio Armijo. (TRP6 995; TRP7 1208) Antique Row shop owner Albert Milliken did not like Hecht, and suspected that Hecht was involved with a male prostitute named Joseph Pfeiffer. (TRP5 829-32, 836) When Milliken learned that Hecht was running for the judicial position, he called Judge Armijo's campaign office and asked for a campaign sign to post in his shop window. (TRP5 831) Judge Armijo's son, Morgan Armijo, came to Milliken's shop the next day to deliver the sign, and Milliken told him about his suspicions. (TRP 831-32)

A few days later, Milliken saw Pfeiffer in the neighborhood and told him to contact Morgan. (TRP5 832-33) He also called Morgan and told him Pfeiffer's cellular phone number. (TRP5 833) Shortly after Milliken's conversation with Pfeiffer concluded, Milliken

[2] According to the Washington State Bar Association's records, Hecht registered this location as his business address in April of 1998. (TRP3 470-71)

saw Hecht drive up and stop in front of his shop. (TRP5 834) According to Milliken, Hecht yelled at him: "You don't know who you are dealing with. You keep your [expletive] shut." (TRP5 834)

Morgan Armijo investigated the rumors about Hecht, and questioned several Antique Row shop owners and security guards. (TRP4 753-54; TRP5 757, 794-95) Morgan also found and interviewed a male prostitute named Joseph Hesketh, who alleged that he had been paid by Hecht to engage in sexual acts together. (TRP4 688-89, 712-13) Morgan authored a report detailing the results of his investigation, and included a declaration from Hesketh. (TRP6 996) The report was delivered to Detective Bradley Graham, who was understandably skeptical. (TRP6 998) Detective Graham began his own investigation to determine the validity of the allegations. (TRP 998-99)

Four male prostitutes, Joseph Pfeiffer, Joseph Hesketh, John Marx and Edward Smith, all testified at trial that they had engaged in sexual acts with Hecht in exchange for money. (TRP3 481, 527; TRP4 669; TRP5 882) Each testified that, on a number of occasions, they were picked up by Hecht while loitering on the streets of the Antique Row neighborhood; were driven to his Pearl Street office where they engaged with Hecht in oral sex or

masturbation; were paid money; and were driven back to Antique Row. (TRP3 481, 487-88, 521, 523, 524, 527, 528, 530; TRP4 666, 669, 670-72; TRP5 878, 879, 882, 884, 891-92)

Pfeiffer further testified that Hecht gave him his cellular phone number, and that he often called Hecht when he needed money. (TRP5 892-93) Then, if he was available, Hecht would pick Pfeiffer up and pay him for sex. (TRP5 892-93) Pfeiffer testified that the last time they engaged in this conduct was just before the August 2008 election. (TRP5 902, 904, 907-08; 995) As Hecht dropped off Pfeiffer, Hecht said that it was not going to happen anymore. (TRP5 907-08)

In late August of 2008, Hecht approached Pfeiffer and asked if Pfeifer was talking about him. (TRP5 911) Pfeiffer told Hecht that Hesketh was the one who was talking about him. (TRP5 911) Pfeiffer got into Hecht's car, and they drove around the area looking for Hesketh. (TRP5 911-12) They found Hesketh and his boyfriend, Michael Mundorff, walking in an alley. (TRP4 612-13, 616, 690, 691, TRP5 912) Hecht drove toward them and then stopped his car in front of them. (TRP4 612-13, 616, 690, 691, TRP5 912)

According to Hesketh and Mundorff, Hecht confronted

Hesketh and asked if Hesketh had been talking about him. (TRP4 620, 693) Hesketh told Hecht that he did not know what he was talking about. (TRP4 694) Hesketh and Mundorff testified that Hecht told Hesketh: "You better not be talking about me. If I find out you are talking about me, I am going to kill you." (TRP4 620, 693) However, Pfeiffer testified that Hecht only asked Hesketh if he was "talking shit" about him, and that Hesketh seemed surprised and told Hecht, "I don't know you." (TRP5 913-14)

Hecht defeated Judge Armijo and was sworn into office in January of 2009. (TRP6 995; TRP7 1208) Soon after, the Tacoma News Tribune began publishing articles about the rumors surrounding Hecht. (TRP6 1004-10) During that time, Detective Graham continued his investigation, and recovered telephone records showing a number of calls between Hecht's cellular phone and the cellular phone belonging to Pfeiffer made between August of 2008 and January of 2009, and one call on September 4, 2008 between Hecht's cellular phone and the cellular phone belonging to Hesketh's father. (TRP6 998-99, 1020-24)

Hecht testified that he provided legal assistance to businesses located in the Antique Row area, including Club Silverstone, Mecca, and a restaurant called Destiny's. (TRP7

1217-18, 1223-24, 1264) He also assisted in drafting wills for some of the patrons of those establishments who were suffering from AIDS. (TRP7 1218)

He testified that he had never seen John Marx or Edward Smith before they testified against him at trial. (TRP7 1226-27) He did not meet Hesketh until he confronted him in August of 2008 about the rumors Hesketh was spreading. (TRP7 1230, 1232, 1250-51) Hecht also denied threatening Hesketh. (TRP7 1235; 1251)

Hecht met Pfeiffer when Pfeiffer approached him on the street and asked for money. (TRP7 1236) Hecht wanted to help Pfeiffer improve his situation, so he tried to counsel and advise Pfeiffer, and paid him to perform work at his office. (TRP7 1236-39) He occasionally gave Pfeiffer money or clothing. (TRP7 1267-68) Hecht also testified that he did sometimes pick up transients, but only because he was trying to help them by giving them work to do in his office or on his campaign. (TRP7 1269-70) He denied ever paying the men for sex. (TRP7 1290, 1294, 1304, 1334)

Former Antique Row transient William Mingee testified that Hecht gave him legal assistance at no charge, and paid him to move office furniture and assist in his campaign for judge. (TRP6

1075-78) He never engaged in any sexual acts with Hecht. (TRP6 1076)

The defense also presented a great deal of evidence that contradicted the testimony given by Hesketh, Pfeiffer, Marx and Smith. For example, Hecht and his law office landlord, Colleen Grady, testified that Hecht did not have access to or begin renting an office in the Pearl Street building until October of 2008, well after many of the sexual encounters were supposed to have taken place there.[3] (TRP7 1177, 1179-80, 1261, 1278) Several witnesses testified that the layout and interior of Hecht's office did not look the way Pfeiffer, Hesketh, Marx and Smith described it. (TRP3 484-85, 529-30, TRP4 569-71, 574-75, 673; TRP7 1182, 1191-92, 1279) Additionally, Hecht's doctor testified that Hecht had several medical issues that would have made it difficult or impossible for him to have engaged in the sex acts described by the men. (TRP6 1153-54, 1155-56, 1158; TRP7 1266)

B. PROCEDURAL HISTORY

The State charged Michael Hecht in Pierce County Superior Court with one count of felony harassment (a threat to kill made

[3] John Marx and Edward Smith testified that their interactions with Hecht occurred around 2001 and 2002. (TRP3 481, 527)

against Joseph Hesketh) pursuant to RCW 9A.46.020, and one count of patronizing a prostitute (Joseph Pfeiffer) pursuant to RCW 9A.88.110. (CP 341-42)

Hecht's pretrial motions to sever, to change venue, and to dismiss were all denied. (CP 6-34, 35-56, 57-87, 339-40: RP 07/01/09 RP 36, 49) Over Hecht's objection, the State was granted permission to present testimony from three male prostitutes detailing their contacts with Hecht and testimony regarding verbal threats made to other individuals, as evidence of a common scheme or plan under ER 404(b). (CP 88-110, 182-96, 389-96, 336-38; 08/25/09 RP 9-68; 09/09/09 RP 45-56)

A jury convicted Hecht on both counts. (TRP8 1467-68; CP 370-72) Because Hecht was a first-time offender, the trial court imposed community service in lieu of jail time for the felony harassment conviction, and suspended the sentence for the misdemeanor patronizing conviction. (11/19/10 RP 20-22; CP 397, 400, 407-08) This appeal timely follows. (CP 413)

V. ARGUMENT & AUTHORITIES

A. THE PROSECUTOR'S MISCONDUCT DURING CLOSING ARGUMENT DEPRIVED HECHT OF HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL.

The right to a fair trial is a fundamental liberty secured by the Sixth and Fourteenth Amendments to the United States Constitution and article I, section 22 of the Washington State Constitution. Estelle v. Williams, 425 U.S. 501, 503, 96 S. Ct. 1691, 48 L. Ed. 2d 126 (1976); State v. Finch, 137 Wn.2d 792, 843, 975 P.2d 967 (1999). Prosecutors have a duty to see that those accused of a crime receive a fair trial. State v. Charlton, 90 Wn.2d 657, 664-65, 585 P.2d 142 (1978). Prosecutorial misconduct may deprive a defendant of his right to a fair trial. State v. Davenport, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984). "A '"[f]air trial" certainly implies a trial in which the attorney representing the state does not throw the prestige of his public office ... and the expression of his own belief of guilt into the scales against the accused.'" State v. Monday, 171 Wn.2d 667, 677, 257 P.3d 551 (2011) (alteration in original) (quoting State v. Case, 49 Wn.2d 66, 71, 298 P.2d 500 (1956); *see* State v. Reed, 102 Wn.2d 140, 145-47, 684 P.2d 699 (1984)).

In the interest of justice, a prosecutor must act impartially,

seeking a verdict free of prejudice and based upon reason. Charlton, 90 Wn.2d at 664. "The prosecutor should not use arguments calculated to inflame the passions or prejudices of the jury." AMERICAN BAR ASSOCIATION, STANDARDS FOR CRIMINAL JUSTICE std. 3–5.8(c) (2d ed. 1980); State v. Brett, 126 Wn.2d 136, 179, 892 P.2d 29 (1995); State v. Belgarde, 110 Wn.2d 504, 755 P.2d 174 (1988).

In order to prevail on a claim of prosecutorial misconduct, a defendant is required to show that in the context of the record and all of the circumstances of the trial, the prosecutor's conduct was both improper and prejudicial. State v. Thorgerson, 172 Wn.2d 438, 442, 258 P.3d 43 (2011). To show prejudice requires that the defendant show a substantial likelihood that the misconduct affected the jury verdict. State v. Ish, 170 Wn.2d 189, 195, 241 P.3d 389 (2010); State v. Dhaliwal, 150 Wn.2d 559, 578, 79 P.3d 432 (2003).

Recently, in In re Glasmann, __ Wn.2d __, 286 P.3d 673 (2012), our State Supreme Court addressed a claim of prosecutorial misconduct based on particular PowerPoint slides used by the prosecutor in conjunction with his closing argument to the jury. Glasmann was facing charges of first degree assault,

attempted first degree robbery, first degree kidnapping, and obstruction. 286 P.3d at 676. In closing argument, the State used an extensive PowerPoint[4] presentation, which included slides described by the Court as follows:

> Each of the slides containing a video shot or photograph included a caption consisting of testimony, recorded statements, or the prosecutor's commentary.
>
> One slide showed Glasmann crouched behind the minimart counter with a choke hold on Benson and a caption reading, "YOU JUST BROKE OUR LOVE." Another slide featuring a photograph of Benson's back injuries appeared with the captions, "What was happening right before defendant drove over Angel ...," and "... you were beating the crap out of me!" This slide also featured accompanying audio.
>
> In addition, the prosecutor argued that jurors should not believe Glasmann's testimony. He told the jurors that the law required them to "[c]ompare Angel Benson's testimony and the testimony of the remainder of the State's witnesses to the defendant's." The prosecutor then told jurors that in order to reach a verdict they must determine: "Did the defendant tell the truth when he testified?"
>
> At least five slides featured Glasmann's booking photograph and a caption. In one slide, the booking photo appeared above the caption, "DO YOU BELIEVE HIM?" In another booking photo slide the caption read, "WHY SHOULD YOU BELIEVE ANYTHING HE SAYS ABOUT THE ASSAULT?" Near the end of the presentation, the booking photo appeared three more times: first with the word "GUILTY" superimposed diagonally in red letters across Glasmann's battered face. In the second slide

[4] As the Court explained, "'PowerPoint' is a registered trademark of a Microsoft graphics presentation software program." Glasmann, 286 P.3d at 676 fn. 2.

> the word "GUILTY" was superimposed in red letters again in the opposite direction, forming an "X" shape across Glasmann's face. In the third slide, the word "GUILTY," again in red letters, was superimposed horizontally over the previously superimposed words. As best as we can determine, the prosecutor stated the following while the "GUILTY" slides were being displayed:
>
> > You've been provided with a number of lesser crimes if you believe the defendant is not guilty of the crimes for which the State has charged him, but the evidence in this case proves overwhelmingly that he is guilty as charged, and that's what the State asks you to return in this case: Guilty of assault in the first degree; guilty of attempted robbery in the first degree; guilty of kidnapping in the first degree; and guilty of obstructing a police officer. Hold him accountable for what he did on October 23rd, 2004, by finding him guilty as charged. Thank you.

286 P.3d at 676-77 (footnote omitted, citations to the record omitted). The defense did not lodge any objection at the time. 286 P.3d at 677.

The jury convicted Glasmann of first degree kidnapping and obstruction, and the lesser included offenses of second degree assault and attempted second degree robbery. Glasmann, 286 P.3d at 677. Glasmann's convictions were affirmed in a direct appeal. 286 P.3d at 677. Glasmann later filed a personal restraint petition asserting that the prosecutor's closing argument deprived him of a fair trial and that his trial counsel's assistance was

ineffective. 286 P.3d at 677.

The Court granted review and reversed Glasmann's convictions after finding that the prosecutor's PowerPoint slides and closing argument constituted flagrant and ill intentioned misconduct. Glasmann, 286 P.3d at 675, 679, 682-83. In so holding, the Court noted:

> Our courts have repeatedly and unequivocally denounced the type of conduct that occurred in this case. First, we have held that it is error to submit evidence to the jury that has not been admitted at trial. . . . Here, the prosecutor intentionally presented the jury with copies of Glasmann's booking photograph altered by the addition of phrases calculated to influence the jury's assessment of Glasmann's guilt and veracity. . . . There certainly was no photograph in evidence that asked "DO YOU BELIEVE HIM?" There was nothing that said, "WHY SHOULD YOU BELIEVE ANYTHING HE SAYS ABOUT THE ASSAULT?" And there were no sequence of photographs in evidence with "GUILTY" on the face or "GUILTY, GUILTY, GUILTY." Yet this "evidence" was made a part of the trial by the prosecutor during closing argument.

286 P.3d at 678 (citations to the record omitted). The Court also found that, through his closing argument and PowerPoint slides, the prosecutor impermissibly expressed his personal opinion of Glasmann's guilt. 286 P.3d at 679.

The slides and argument that were so repugnant to the Supreme Court in Glasmann are nearly identical to slides used and

arguments made by the prosecutor during closing arguments in this case. For example, the prosecutor repeatedly displayed slides containing a photograph of Hecht with Pfeiffer and/or Hesketh along with captions consisting of testimony or the prosecutor's commentary.[5] Slide number 15 shows side-by-side photographs of Hecht and Hesketh. Appearing above Hecht's photograph is the caption:

> "You talking shit about me?"
> "You better not be talking shit about me"
> "If you are- . . . "*I'll kill you*."

(CP 451; also attached in Appendix) On the slide, the phrase "I'll kill you" is emphasized by the use of underlining and italics. (CP 451)

Slide number 67 shows side-by-side photographs of Hecht and Pfeiffer. Under Hecht's photo, in bright red all-capital letters, is the word "CUSTOMER." Under Pfeiffer's photo, also in bright red all-capital letters, is the word "PROSTITUTE." (CP 503; also attached in Appendix)

Slide number 65 and number 85 show side-by-side photographs of Hecht with Hesketh or Pfeiffer. Printed diagonally

[5] The photographs of Hecht, Pfeiffer and Hesketh had been previously admitted at trial as Exhibit Numbers P-4, P-5 and P-6.

across Hecht's face in large, red, all-capital letters, is the word "GUILTY." (CP 501, 521; also attached in Appendix) As slide number 65 is being shown, the prosecutor is apparently telling the jury: "And you know from the evidence that you heard in this case that even judges can commit crimes." (RP 1387)

Also, like in Glasmann, the prosecutor repeatedly asks the jury to "compare" Hecht's testimony with that of Pfeiffer and Hesketh, and tells the jury they should not "believe" Hecht. (TRP8 1397-98) At one point, the prosecutor says to the jury, "ask yourself, why would these witnesses make this up?" (TRP8 1396) The prosecutor emphasizes his attempt to bolster Pfeiffer's and Hesketh's credibility by showing slides at the same time that state, "why would [they] make it up?" (TRP8 1396; CP 515, 516 (slide nos. 79-80)). Then, the prosecutor states:

> Compare his testimony to the defendant's. When you are considering the defendant's testimony ask yourself: Do you believe the things that he was telling you when he tells you he goes to a porno theater for chicken soup; when he tells you he's there late at night so he could monitor the police; when he says he represents all these people on Antique Row, when he doesn't. . . . Do you believe him when he says he's just this grandpa-type guy for male prostitutes . . . . Do you believe him when he tells you that? Do you believe him when he says he doesn't know Joey Hesketh . . . .

(TRP8 1397-98) At the same time, the prosecutor is apparently showing slides with Hecht's photo and captions summarizing Hecht's testimony followed by question marks. (CP 517, 518; (slide nos. 81-82))

Later, the prosecutor displayed a slide to the jury that reads:

DEFENDANT'S CREDIBILITY

- If he's not truthful about the little things ...
  Why should you believe him when he denies the big things?
- YOU SHOULDN'T

(CP 520 (slide no. 84, also attached in Appendix) At the same time, the prosecutor says to the jury: "Ask yourself when you are considering the defendant's testimony, if he's not being truthful with you about the little things, why should you believe anything he says when he talks about the big things, when he comes in here and says, 'I did not do it.' You shouldn't." (TRP8 1399)

As in Glasmann, the prosecutor committed misconduct because he presented evidence that was "deliberately altered in order to influence the jury's deliberations" and because he expressed "his personal opinion of [Hecht's] guilt through both his slide show and his closing arguments." 286 P.3d at 678, 679.

The prosecutor made other improper statements as well. In

rebuttal closing, the prosecutor told the jury that the "State's not asking you to do anything in this case other than return a verdict that represents the truth about what happened." (TRP8 1453) But it is improper to request that a jury declare "the truth," because "[a] jury's job is not to 'solve' a case. . . . Rather, the jury's duty is to determine whether the State has proved its allegations against a defendant beyond a reasonable doubt." State v. Anderson, 153 Wn. App. 417, 429, 220 P.3d 1273 (2009).

Like trial counsel in Glasmann, Hecht's counsel did not object at trial to the closing argument and PowerPoint images. Absent a proper objection, a defendant must show that the misconduct was so flagrant and ill intentioned that no curative instruction would have obviated the prejudice. State v. Hoffman, 116 Wn.2d 51, 93, 804 P.2d 577 (1991). However, the Glasmann Court found that misconduct nearly identical to the misconduct in this case was flagrant and ill intentioned, and that it was so pervasive that it could not have been cured by an instruction. 286 P.3d at 679. The Court explained:

> Highly prejudicial images may sway a jury in ways that words cannot. Such imagery, then, may be very difficult to overcome with an instruction. Prejudicial imagery may become all the more problematic when displayed in the closing arguments of a trial, when the

> jury members may be particularly aware of, and susceptible to, the arguments being presented. Given the multiple ways in which the prosecutor attempted to improperly sway the jury and the powerful visual medium he employed, no instruction could erase the cumulative effect of the misconduct in this case. The prosecutor essentially produced a media event with the deliberate goal of influencing the jury to return guilty verdicts on the counts against Glasmann.

286 P.3d at 679 (citing State v. Gregory, 158 Wn.2d 759, 866-67, 147 P.3d 1201 (2006)).

Likewise, the prejudice caused by the prosecutor's misconduct in this case could not have been cured by an instruction. The prosecutor used highly prejudicial images and improper arguments in closing in an effort to sway the jury into returning guilty verdicts. As stated by the Glasmann court:

> When viewed as a whole, the prosecutor's repeated assertions of the defendant's guilt, improperly modified exhibits, and statement that jurors could acquit [the defendant] only if they believed him represent the type of pronounced and persistent misconduct that cumulatively causes prejudice demanding that a defendant be granted a new trial.

286 P.3d at 680-81. This same analysis applies to the prosecutor's misconduct in this case; it was prejudicial and violated Hecht's constitutional right to a fair trial.

B. THE CHARGING DOCUMENT AND THE "TO CONVICT" INSTRUCTION FOR THE CRIME OF HARASSMENT WERE CONSTITUTIONALLY DEFICIENT BECAUSE THEY BOTH FAILED TO INCLUDE THE ESSENTIAL ELEMENT THAT THE THREAT WAS A "TRUE THREAT."

1. *All Essential Elements of the Crime of Harassment Must Be Pleaded in the Charging Document and Included in the "To Convict" Instruction*

Due process requires that the essential elements of a charged offense be included in the charging document, regardless of whether they are statutory or non-statutory. U.S. Const. amd. VI; Wash. Const. art. I, § 22; State v. Goodman, 150 Wn.2d 774, 784, 83 P.3d 410 (2004); State v. Vangerpen, 125 Wn.2d 782, 787, 888 P.2d 1177 (1995). The purpose of the rule is to give the accused notice of the nature of the allegations so that a defense may be properly prepared. Goodman, 150 Wn.2d at 784; State v. Kjorsvik, 117 Wn.2d 93, 101-02, 812 P.2d 86 (1991).

Charging documents challenged for the first time on appeal will be more liberally construed in favor of validity than those challenged before trial or before a guilty verdict. Kjorsvik, 117 Wn.2d 102. The reviewing court determines whether the necessary facts appear in the information in any form, and if not, whether the defendant was actually prejudiced by the lack of notice. Goodman, 150 Wn.2d at 787-88; Kjorsvik, 117 Wn.2d at 105-06.

> The first prong looks to the face of the charging document and requires at least some language giving notice of the allegedly missing elements. The second prong may look beyond the face of the information to determine if the accused actually received notice of the charges he or she must have been prepared to defend; it is possible that other circumstances of the charging process can reasonably inform the defendant in a timely manner of the nature of the charges.

State v. Courneya, 132 Wn. App. 347, 351, 131 P.3d 343 (2006) (citations omitted). "If the necessary elements are neither found nor fairly implied in the charging document, prejudice is presumed and reviewing courts reverse without reaching the question of prejudice." Courneya, 132 Wn. App. at 351.

Due process also requires that the State prove every essential element of a charged offense. Apprendi v. New Jersey, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000); In re Winship, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); U.S. Const. amd. XIV. Thus, jury instructions must "properly inform the jury of the applicable law." State v. Barnes, 153 Wn.2d 378, 382, 103 P.3d 1219 (2005). It is reversible error to instruct the jury in a manner that relieves the State of its burden of proving every essential element of a criminal offense beyond a reasonable doubt. State v. Pirtle, 127 Wn. 2d 628, 656, 904 P.2d 245 (1995).

A challenge to a jury instruction on the grounds that it relieved the State of its burden of proof may be raised for the first time on appeal. RAP 2.5(a)(3); State v. Kyllo, 166 Wn.2d 856, 862, 215 P.3d 177 (2009); Brett, 126 Wn.2d at 171. The court reviews alleged errors of law in jury instructions de novo. State v. Willis, 153 Wn.2d 366, 370, 103 P.3d 1213 (2005).

2. *It is an Essential Element of the Crime of Harassment That the Threat be a "True Threat"*

A person is guilty of harassment if "the person knowingly threatens . . .[t]o cause bodily injury immediately or in the future to the person threatened or to any other person . . .and [t]he person by words or conduct places the person threatened in reasonable fear that the threat will be carried out." RCW 9A.46.020(1). Harassment is generally a misdemeanor, but is elevated to a felony if the threat involves a threat to kill. RCW 9A.46.020(2)(b)(ii).

In State v. Kilburn, 151 Wn.2d 36, 84 P.3d 1215 (2004), the Supreme Court considered a First Amendment challenge to RCW 9A.46.020, the felony harassment statute. The Court noted that because the statute "criminalizes pure speech," it "'must be interpreted with the commandments of the First Amendment clearly in mind.'" 151 Wn.2d at 41 (quoting State v. Williams, 144 Wn.2d

197, 206-07, 26 P.3d 890 (2001) and Watts v. United States, 394 U.S. 705, 707, 89 S. Ct. 1399, 22 L. Ed. 2d 664 (1969)).

The Kilburn Court held that in order to "avoid unconstitutional infringement of protected speech, RCW 9A.46.020(1)(a)(i) must be read as clearly prohibiting only 'true threats.'" 151 Wn.2d at 43. The Court further explained:

> A true threat is a statement made in a context or under such circumstances wherein a reasonable person would foresee that the statement would be interpreted . . . as a serious expression of intention to inflict bodily harm upon or take the life of another person.

151 Wn.2d at 43. The communication "must be a serious threat, and not just idle talk, joking or puffery." 151 Wn.2d at 46. Whether a true threat was made "is determined under an objective standard that focuses on the speaker." 151 Wn.2d at 44.

The Court considered the issue again in State v. Johnston, 156 Wn.2d 355, 127 P.3d 707 (2006). In that case, the Court reiterated that a statute proscribing threats must be limited to "true threats" to avoid constitutional overbreadth prohibitions, and further found that failure to instruct the jury on the definition of a "true threat" was fatal to the conviction. 156 Wn.2d at 363-65.

In State v. Tellez, Division 1 considered whether, in the

context of a prosecution for telephone harassment, the requirement that the threat was a "true threat" had to be included in the information or the "to convict" instruction. 141 Wn. App. 479, 482-85, 170 P.3d 75 (2007). Johnston notwithstanding, the Tellez court concluded that the "true threat" requirement was a mere definitional component of the harassment statute, and not an essential element. The court reasoned that Johnston did not expressly rule that "a true threat is an essential element of any threatening-language crime." 141 Wn. App. at 483.

The decision in Tellez was incorrect and should not be followed by this Court.[6] In Johnston, the Court held that "the jury must be instructed that a *conviction* under [the statute proscribing threats to bomb or injure property] requires a true threat *and* must be instructed on the meaning of a true threat." 156 Wn.2d at 366 (emphasis added). The language of the Court's holding intimates that the Court considered the "true threat" requirement to be an element of any harassment charge.

The conclusion that the Johnston Court considered the "true

[6] Division 1 recently affirmed its Tellez decision in State v. Allen, 161 Wn. App. 727, 755-56, 255 P.3d 784 (2011). However, our State Supreme Court has granted review of Division 1's opinion in Allen. See State v. Allen, 172 Wn.2d 1014, 262 P.3d 63 (2011).

threat" requirement to be an element is consistent, as well, with how the Washington courts treat mere definitional terms. See e.g., State v. Lorenz, 152 Wn.2d 22, 33-35, 93 P.3d 133 (2004) (observing that the failure to instruct on definitional terms is not an error that requires a conviction to be reversed). By requiring an instruction on the "true threat" requirement, the Johnston Court implicitly distinguished "true threats" from purely definitional terms and signaled its view that whether a threat was a "true threat" is an essential element of a harassment charge.

Furthermore, both the Federal courts and at least one other state Supreme Court have expressly held that whether a threat is a "true threat" is an element of a harassment crime. For example, in State v. Robert T., 7146 N.W.2d 564 (Wis. 2008), the Wisconsin Supreme Court construed its own "bomb scares" statute. That statute provided:

> Whoever intentionally conveys or causes to be conveyed any threat or false information, knowing such to be false, concerning an attempt or alleged attempt being made or to be made to destroy any property by the means of explosives is guilty of a Class I felony.

Wis. Stat. § 947.015 (2003-04).

Discussing its own cases interpreting the "true threat"

requirement, the court concluded: "we are satisfied that upon reading into the elements of the crime a requirement that it must be a 'true threat' renders Wis. Stat. § 947.015 constitutional." Robert T., 7146 N.W.2d at 568. The court further observed: "Indeed, this is exactly what the supreme court of the state of Washington did with a similar statute prohibiting threats." 7146 N.W.2d at 568 (citing Johnston).

The Ninth Circuit has also held that a "true threat" requirement is an essential element of a harassment offense. See United States v. Cassel, 408 F.3d 622 (9th Cir. 2005) (construing 18 U.S.C. § 1860, which proscribes interfering with a federal land sale). The Cassel Court conducted a lengthy analysis of the Supreme Court's decision in Virginia v. Black, 538 U.S. 343, 123 S. Ct. 1536, 155 L. Ed. 2d 535 (2003), and concluded, based on this assessment, that "intent to threaten is a constitutionally necessary element of a statute punishing threats." Cassel, 408 F.3d at 630-34. Applying this rule, in an appeal following a conviction for making interstate threats to injure in violation of 18 U.S.C. § 875(c), the Court noted that "specific intent to threaten is an essential element of a § 875(c) conviction[.]" United States v. Sutcliffe, 505 F.3d 944, 962 (9th Cir. 2007).

The Seventh Circuit reached a similar conclusion in United States v. Fuller, 387 F.3d 643 (7th Cir. 2004). While noting a circuit split on the question of whether a "true threat" must include a subjective component, the Court held: "the only two essential elements for [a prosecution under 18 U.S.C. § 871] are the existence of a true threat to the President and that the threat was made knowingly and willfully." 387 U.S. at 647; accord. United States v. Lockhart, 382 F.3d 447, 450 (4th Cir. 2004) ("The statute governing threats against the President . . . has been interpreted to include two major elements: (1) the proof of a 'true threat' and (2) that the threat is made 'knowingly and willfully'").

Because the Washington Supreme Court has not explicitly stated that the "true threat" requirement is an essential element, the Tellez court concluded that a "true threat" is a mere definitional term that need not be included in the charging document or the "to convict" instruction. 141 Wn. App. at 482-84. But the federal and state decision cited above establish that Division 1's conclusion is incorrect. Accordingly, the Tellez analysis and holding should be rejected, and this Court should hold that the existence of a "true

threat" is an essential element of the crime of harassment.[7]

3. *The Charging Document and "To Convict" Instruction for the Crime of Harassment were Deficient in this Case*

In this case, the information charging Hecht with harassment alleged the following:

> That MICHAEL ANDREW HECHT, in the State of Washington, on or about the 30th day of August, 2008, did unlawfully and feloniously, knowingly and without lawful authority, threaten to cause bodily injury immediately or in the future to Joseph Hesketh IV, by threatening to kill Joseph Hesketh IV, and the words or conduct did place said person in reasonable fear that the threat would be carried out[.]

(CP 341)

The "to convict" instruction required the jury to find the following elements in order to convict Hecht of the crime of felony harassment:

> (1) That on or about the 30th day of August, 2008, the defendant knowingly threatened to cause bodily injury immediately or in the future to Joseph Hesketh IV;
> (2) That the words or conduct of the defendant placed Joseph Hesketh IV in reasonable fear that the threat would be carried out;
> (3) That the defendant acted without lawful authority; and
> (4) That the threat was made or received in the State of Washington.

(CP 361; Instruction No. 11) In a separate instruction, the court

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[7] See e.g. State v. Schmitt, 124 Wn. App. 662, 669 fn. 11, 102 P.3d 856 (2004) ("We need not follow the decisions of other divisions of this court.").

defined the term threaten:

> "Threaten" means to communicate, directly or indirectly, the intent to cause bodily injury in the future to the person threatened or to any other person.
>
> To be a threat, a statement or act must occur in a context or under such circumstances where a reasonable person, in the position of the speaker, would foresee that the statement or act would be interpreted as a serious expression of intention to carry out the threat rather than as something said in jest or idle talk.

(CP 358; Instruction No. 8)

The information did not give proper notice to Hecht and the "to convict" instruction did not properly inform the jury that a "true threat" is a constitutionally required essential element of the crime of harassment.

The omission of this essential element in the information is not cured by its inclusion as a definition in the jury instructions. For example, in Courneya, the court found the State's omission of the implied element of knowledge from an information charging hit-and-run was fatal to the ensuing conviction, even though two jury instructions explained that knowledge was an essential element of the charged crime. 132 Wn. App. at 353-54; see also Vangerpen, 125 Wn.2d at 788 (holding that proper jury instructions cannot cure a defective information). The Courneya court reversed the

conviction with instructions to dismiss the information. 132 Wn.2d at 354.

Furthermore, the instructional error is harmful because if a constitutionally required element is treated as a "definition," then the State's burden of proof is diluted, and this Court cannot be confident that the jury's verdict does not punish protected speech. And in this case specifically, the Court cannot be confident that the jury found that Hecht's statements were anything more than hyperbole or puffery.

C. THE STATE FAILED TO PROVE ALL THE ESSENTIAL ELEMENTS OF HARASSMENT BECAUSE THERE WAS INSUFFICIENT EVIDENCE THAT HESKETH HAD A REASONABLE FEAR THAT HECHT WOULD ACTUALLY CARRY OUT HIS THREAT, AND INSUFFICIENT EVIDENCE THAT HECHT COULD HAVE FORESEEN THAT HESKETH MIGHT TAKE THE THREAT SERIOUSLY.

"Due process requires that the State provide sufficient evidence to prove each element of its criminal case beyond a reasonable doubt." City of Tacoma v. Luvene, 118 Wn.2d 826, 849, 827 P.2d 1374 (1992) (citing In re Winship, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970)). Evidence is sufficient to support a conviction only if, viewed in the light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. State v.

Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." Salinas, 119 Wn.2d at 201.

RCW 9A.46.020(1) provides in relevant part that a person is guilty of harassment if:

> (a) Without lawful authority, the person knowingly threatens:
> (i) To cause bodily injury immediately or in the future to the person threatened or to any other person; . . . and
> (b) The person by words or conduct places the person threatened in reasonable fear that the threat will be carried out.[8]

As noted above, the punished speech must rise to the level of a "true threat." State v. Knowles, 91 Wn. App. 367, 373, 957 P.2d 797 (1998). A "true threat" is a statement made "'in a context or under such circumstances wherein a reasonable person would foresee that the statement would be interpreted ... as a serious expression of an intention to inflict bodily harm upon or to take the life of [another individual].'" Johnston, 156 Wn.2d at 360-61 (quoting United States v. Khorrami, 895 F.2d 1186, 1192 (7th Cir.1990)) (internal quotation marks omitted).

[8] The crime is elevated to a class C felony if the threat involves a threat to kill. RCW 9A.46.020(2)(b).

In State v. C.G., 150 Wn.2d 604, 80 P.3d 594 (2003), the Court reversed a harassment conviction based on the lack of evidence that the person threatened had actually been placed in reasonable fear that the threat made would be carried out. C.G. was acting out in class, became angry, used profanity, and kicked her desk. 150 Wn.2d at 606. C.G. left the room with the vice principal, yelling obscenities as she went. 150 Wn.2d at 606. Finally, C.G. said to the vice principal, "I'll kill you Mr. Haney, I'll kill you." 150 Wn.2d at 607. The vice principal testified that C.G.'s threat "caused him concern" and that, "based on what he knew about C.G., she might try to harm him or someone else in the future." 150 Wn.2d at 607. The Court held that "the State must prove that the victim was placed in reasonable fear that the same threat, i.e., 'the' threat, would be carried out." 150 Wn.2d at 609.

As in C.G., there is insufficient evidence in this case to convince a reasonable jury that Hesketh had a reasonable fear that Hecht would carry out his threat. According to Hesketh and Mundorff, Hecht drove up in his car, stopped in front of them, confronted Hesketh, said he would kill Hesketh if he found out Hesketh was talking about him, and drove away. (TRP4 620, 693) Hesketh testified that he felt "uncomfortable," "nervous," and

"worried" after the encounter. (695) He alluded to a vague concern that Hecht might someday carry out the threat because he "knows criminals." (TRP4 696)

The State also relied on testimony from Mundorff and Hesketh's father, who recalled that Hesketh seemed nervous and scared in the days following the confrontation, and that he told his father that if anything happened to him it was because of Hecht. (TRP4 624, 697-98; TRP5 781, 785) However, Hesketh was at the time of the incident and the time of trial, a regular heroin and crack cocaine user, and Mundorff testified that crack tends to make Hesketh act paranoid. (TRP4 609, 632, 665-66, 702) It is therefore impossible to conclude, beyond a reasonable doubt, that Hesketh's demonstrations of fear after the confrontation were a reasonable reaction to Hecht's statement, rather than the predictable result of his extensive drug use.

Furthermore, the State had to prove that a reasonable person would foresee that his statement would be interpreted as a serious expression of an intent to cause Hesketh's death, as opposed to "just idle talk, joking or puffery." Kilburn, 151 Wn.2d at 46. Whether a true threat was made "is determined under an objective standard that focuses on the speaker." Kilburn, 151

Wn.2d at 44. But there is insufficient evidence in this case to conclude that Hecht, a recently elected judge in the public eye, could have foreseen that his statement to Hesketh would be interpreted as a serious expression of an intention to take or cause the taking of Hesketh's life, rather than hyperbole intended simply to convince Hesketh to refrain from spreading rumors about him.

Like in C.G., the State failed to prove that the victim of the threat, Hesketh, had a reasonable fear that the threat would be carried out, and failed to prove that Hecht's statements or actions showed that he intended or believed the threat would be taken seriously. Accordingly, the harassment conviction must be reversed.

D. THE PREJUDICIAL NATURE OF SMITH'S AND MARX'S TESTIMONY OUTWEIGHS ITS RELEVANCE AND WAS THEREFORE INADMISSIBLE UNDER ER 404(B) AND ER 403.

Over defense objection, the trial court allowed the State to call Smith and Marx to testify about their past sexual encounters with Hecht. (CP 88-110, 182-96; 08/25/09 RP 38-47; 61-68) The court admitted the evidence under ER 404(b) as evidence of a "common scheme or plan." (CP 389-96; 08/25/09 RP 61-68)

A trial court's decision to admit or exclude evidence is

reviewed for an abuse of discretion. State v. Tharp, 27 Wn. App. 198, 205-06, 616 P.2d 693 (1980). A trial court abuses its discretion when its decision is manifestly unreasonable, or is exercised on untenable grounds, or for untenable reasons. State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). In this case, the trial court abused its discretion when it admitted Smith's and Marx's testimony about their past sexual interactions with Hecht because it was only minimally relevant but highly prejudicial.

A defendant must only be tried for those offenses actually charged. Therefore, evidence of other crimes must be excluded unless shown to be relevant to a material issue and to be more probative than prejudicial. State v. Coe, 101 Wn.2d 772, 777, 684 P.2d 668 (1984); State v. Goebel, 40 Wn.2d 18, 21, 240 P.2d 251 (1952).

Although ER 404(b) allows the admission of evidence of a "common scheme or plan," this is not an exception to the ban on propensity evidence. State v. Gresham, 173 Wn.2d 405, 429, 269 P.3d 207 (2012). "Even when evidence of a person's prior misconduct is admissible for a proper purpose under ER 404(b), it remains inadmissible for the purpose of demonstrating the person's

character and action in conformity with that character." Gresham, 173 Wn.2d at 429.

Before evidence can be admitted under ER 404(b) for the purpose of proving a common scheme or plan, it must satisfy four requirements: the prior acts must be (1) proved by a preponderance of the evidence, (2) admitted for the purpose of proving a common scheme or plan, (3) relevant to prove an element of the crime charged or to rebut a defense, and (4) more probative than prejudicial. State v. Lough, 125 Wn.2d 847, 852, 889 P.2d 487 (1995). The State's burden to demonstrate admissibility is "substantial." State v. DeVincentis, 150 Wn.2d 11, 17, 20, 74 P.3d 119 (2003).

To prove a common scheme or plan, the other crime evidence must demonstrate "that the person 'committed markedly similar acts of misconduct against similar victims under similar circumstances.'" State v. Carleton, 82 Wn. App. 680, 683, 919 P.2d 128 (1996) (quoting Lough, 125 Wn.2d at 852). Stated another way, the "prior misconduct must demonstrate not merely similarity in results, but such occurrence of common features that the various acts are naturally to be explained as caused by a general plan of which the charged crime and the prior misconduct

are the individual manifestations." Carleton, 82 Wn. App. at 684 (quoting Lough, 125 Wn.2d at 860).

DeVincentis notes several relevant factors to consider in determining relevance, such as the age of the victim, the need for the evidence, the absence of physical proof, and the absence of corroborating evidence. 150 Wn.2d at 23. In this case, there were already two prosecution witnesses for the charged crimes, Pfeiffer and Hesketh, who could corroborate each other to the extent that was relevant. Both men were old enough to clearly testify on their own behalf. And, although there was no physical evidence, this does not outweigh the highly prejudicial nature of Marx's and Smith's testimony.

Furthermore, the probative value of this testimony is also diminished because the allegations lack the "marked" similarities that would increase the probative value of the prior bad act evidence. That is because the witnesses' interactions with Hecht were not unique; it was common practice around Antique Row for "Johns" to circle the block in their cars, pick up a male prostitute, drive somewhere private, engage in a sexual act, and then return the prostitute to the street. (TRP3 399, 443, 521, 523-24; TRP4 666-68, 747-48; TRP5 872) Even an undercover police officer, who

often poses as a prostitute in order to lure and arrest "Johns," testified about this commonly used method of soliciting a prostitute. (TRP5 869, 870, 872) The "scheme" or "plan" is therefore used by nearly every perpetrator. Smith's and Marx's testimony was therefore unnecessary and did not provide significant insight into whether Hecht had devised his own plan or scheme to pick up prostitutes. Marx's and Smith's testimony was of minimal probative value and therefore unnecessary.

Hecht was unfairly prejudiced because the jurors were presented with inflammatory testimony of alleged prior illegal sexual acts, which they would have been naturally inclined to treat as evidence of criminal propensity. And the prejudicial potential of prior bad acts evidence is at its highest in sex cases. This is so because, as the Washington Supreme Court has recognized, "Once the accused has been characterized as a person of abnormal bent, driven by biological inclination, it seems relatively easy to arrive at the conclusion that he must be guilty, he could not help but be otherwise." State v. Saltarelli, 98 Wn.2d 358, 363, 655 P.2d 697 (1982) (citations omitted).

The minimal relevance and probative value of Smith's and Marx's testimony did not outweigh its prejudicial impact. The trial

court abused its discretion when it allowed this testimony to be presented to the jury, and Hecht's convictions should be reversed.

VI. CONCLUSION

The prosecutor committed misconduct in closing argument by his repeated use of altered exhibits and captioned photographs, by expressing his personal opinion of Hecht's guilt and veracity through his statements and the slides in his PowerPoint presentation, and by telling the jury that it should return a verdict that represented the "truth." This misconduct denied Hecht his constitutional right to a fair trial. Hecht's convictions must therefore be reversed and his case remanded for a new trial.

Alternatively, because the information and "to convict" instruction for harassment omitted the essential "true threat" element, Hecht's conviction should be reversed and the harassment charge dismissed. The State also failed to provide sufficient evidence that Hesketh had a reasonable fear that Hecht would act on his statements, or that Hecht could have foreseen that his statements would be taken as a serious threat. For this reason also, Hecht's harassment conviction should be reversed.

Finally, the trial court's error in admitting Smith's and Marx's testimony prejudiced Hecht's right to a fair trial, and requires

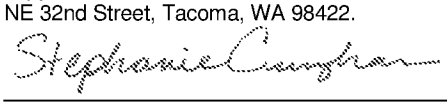
reversal of both convictions.

DATED: November 30, 2012

STEPHANIE C. CUNNINGHAM
WSB #26436
Attorney for Michael Andrew Hecht

CERTIFICATE OF MAILING

I certify that on 11/30/2012, I caused to be placed in the mails of the United States, first class postage pre-paid, a copy of this document addressed to: Michael Hecht, 4988 NE 32nd Street, Tacoma, WA 98422.



STEPHANIE C. CUNNINGHAM, WSBA #26436

APPENDIX

COPIES OF SELECT SLIDES FROM THE STATE'S POWERPOINT PRESENTATION

(Copy of Slide Number 15)

COUNT I – HARASSMENT

(Copy of Slide Number 65)

(Copy of Slide Number 67)

COMPARE TO DEFENDANT

- Tells you he goes to a porno theater for chicken soup??
- Goes to Mecca late at night to spy on the cops??
- Says he "represents" people on Antique Row when he really doesn't?
- "Grandpa type guy" for male prostitutes?

(Copy of Slide Number 81)

CREDIBILITY

- Claims he doesn't know Joey Hesketh when everybody Defendant hangs out with knows Hesketh
- He's on and off the phone w/ friends who hang up and immediately call Joe Pfeiffer when he's a fugitive—but he tells you he wasn't telling his friends what to do?

(Copy of Slide Number 82)

(Copy of Slide Number 85)

DEFENDANT'S CREDIBILITY

- If he's not truthful about the little things … Why should you believe him when he denies the big things?

- YOU SHOULDN'T

(Copy of Slide Number 84)

THE EVIDENCE

- Proves beyond a reasonable doubt that Defendant is:
- GUILTY OF COUNT I
  - w/ special verdict of threat to kill
- GUILTY OF COUNT II

(Copy of Slide Number 86)

CUNNINGHAM LAW OFFICE

November 30, 2012 - 12:12 PM

Transmittal Letter

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Court of Appeals Case Number: 40057-0

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- ○ Answer/Reply to Motion: ____
- ◉ Brief: Appellant's
- ○ Statement of Additional Authorities
- ○ Cost Bill
- ○ Objection to Cost Bill
- ○ Affidavit
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